87-1257

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

EMERY A. SOBONY,

Petitioner,

vs.

JAMES A. TILBERRY,

Respondent,

PETITION FOR A WRIT OF CERTIORARI
To the U.S. Court of Appeals
For the Sixth Circuit

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Counsel for Petitioner

QUESTIONS PRESENTED

Whether there is a violation of due process under the Fifth and Fourteenth Amendments of the Constitution of the United States where, following a jury verdict in a civil case, a reviewing court considers a motion for directed verdict made during the trial and, although finding that there was evidence submitted on both sides, substitutes its judgment for that of the jury by weighing the evidence and the credibility of the witnesses and reversing the jury's verdict.

PARTIES

The Petitioner to this action is:

EMERY A. SOBONY

The Respondent is:

JAMES H. TILBERRY

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OPINIONS BELOW

The opinions of the Court of Appeals of Ohio, Eighth District, and the Supreme Court of Ohio, appear in the appendix hereto.

JURISDICTION

This is a civil action originally filed in Cuyahoga County, Ohio in 1979. The case was tried to a jury commencing on January 23, 1986 and concluding on February 10, 1986. The jury returned a unanimous verdict in favor of Plaintiff-Petitioner, Emery A. Sobony, against Defendant-Respondent, James H. Tilberry, in the sum of $225,000.00. The Trial Court entered a final judgment in favor of Plaintiff-Petitioner, Sobony, on March 6, 1986. Defendant-Respondent, Tilberry, filed a timely appeal from that judgment in the Court of Appeals of Ohio, Eighth District.

The Court of Appeals rendered its Journal Entry and Opinion on April 16, 1987, reversing the judgment of the Trial Court. Plaintiff-Petitioner, Sobony, filed a Motion For Reconsideration on

April 23, 1987. The motion was subsequently denied and final judgment was entered in favor of the Defendant-Respondent, Tilberry, on or about April 30, 1987.

Thereafter, Plaintiff-Petitioner, Sobony, timely filed a Memorandum In Support of Jurisdiction with the Supreme Court of Ohio. That Court entered its order overruling Plaintiff-Petitioner's Motion on October 28, 1987.

The Petitioner now requests the review of this Court by Writ of Certiorari, which is filed within ninety (90) days of the final judgment of the Supreme Court of Ohio. This Court's jurisdiction is invoked pursuant to 28 USCS § 1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment 5.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Constitution of the United States, Amendment 14, § 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities

of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Ohio Constitution, Article I, § 5.

"Trial by jury; reform in civil jury system. The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."

STATUTES INVOLVED

28 USCS § 1254
Rule 50 (A)(1), Ohio Rules of Civil Procedure
Rule 12, Ohio Rules of Appellate Procedure

STATEMENT OF THE CASE

Plaintiff, Emery A. Sobony, had conceived and created a prototype for a board game somewhat similar to Monopoly, with the additional feature of generating revenues from advertisers who purchased spots on the board. Defendant, Wesley Reese, who had become interested in Sobony's game, associated himself with Sobony on the basis of a theoretical partnership relative to manufacturing, promoting and selling the board game. There is absoultely no evidence in this case that there was any discussion about anyone other than Sobony owning the invention and/or patent prior to June 13, 1977. Further, the testimony in the case is clear that from the beginning of the association between Sobony and Reese it was agreed that Sobony was entitled to compensation

for his invention as something additional to him over what anybody else, including Reese, would receive.

In March, 1977, Reese and Sobony engaged corporate counsel to incorporate Sobony's sole proprietorship known as Osobo Games & Toys. The corporation was called Osobo Games & Toys, Inc. Initially, Reese and Sobony each received fifty (50) shares. Later, they each received an additional twenty-five (25) shares in exchange for services performed during the formation of the corporation.

Although Sobony and Reese had agreed on a fifty/fifty ownership concept this concept failed from the very beginning. Reese testified at trial that he did not feel the fifty/fifty concept was fair from "day one". Soon Reese convinced Sobony that the corporation should issue and sell

additional shares of stock to raise revenue for the production of the game. Reese solicited friends and relatives who bought share and he soon had control of a majority vote. In the meantime, Sobony had a minority share and absolutely no control over the corporation.

Corporate counsel referred Sobony and Reese to Defendant James H. Tilberry, a patent attorney, for the sole purpose of preparing a patent application for the game. The Plaintiff conferred with Tilberry in April of 1977 and engaged Tilberry's services for the purpose of preparing the patent application. Although Tilberry distinguished his representation as being employed only by the corporation, it is clear that Sobony did not really understand or make such distinction. In any event, the

evidence is clear that Sobony made the decision to engage Tilberry's services for the purpose of preparing the patent application because he fully trusted and reposed his confidence in Tilberry after having met with him.

Sobony met frequently with Tilberry between April and June of 1977 relative to preparing the patent application for filing in Washington. On June 13, 1977, Sobony was called to Tilberry's office on the basis that the patent application was ready for signature and submission to Washington. When Sobony appeared at Tilberry's office, Tilberry reviewed the patent application with Sobony and had Sobony sign same. Then, Tilberry handed Sobony a Power of Attorney to sign, designating Tilberry as Sobony's attorney, and Sobony signed same. Then, Tilberry

handed Sobony a legal document entitled Assignment and told him to read and sign it. This document was an Assignment of all Sobony's rights of ownership to the corporation. Sobony, totally surprised with this document that had been thrust before him with the advice to read and sign same, queried of Tilberry as to what was the good and valuable consideration which he was supposed to have received. Tilberry, representing the corporation, assured Sobony that he would be paid standard royalties by the corporation, but that the amount of the royalty could not be determined until the cost of manufacturing was determined. Additionally, the fact that advertising dollars would be generated as well as game sales made it difficult to determine the royalty until these revenues were established. It is clear that Sobony

believed and trusted Tilberry and felt that he would be paid a fair royalty based on industry standard once the cost figures were solidified. It is also clear from the evidence in the case that Sobony was totally confused relative to the question of ownership, and believed that he was retaining legal ownership but giving the corporation the right to manufacture, promote and sell the game in return for royalties he would receive. This confusion was well known and testified to by Tilberry, as well as being documented by testimony and exhibits at trial, including a letter Tilberry sent to general counsel several days after the Assignment was executed admitting his knowledge of Sobony's confusion and ignorance when Sobony "came to (Tilberry's) office to execute this application".

The evidence is uncontroverted that no one had actually instructed Tilberry to prepare an Assignment and the placing of the Assignment before Sobony at a time when he was excited about having his patent application submitted to Washington, with the instructions to read and sign, was a total surprise. Tilberry stated, in his letter to general counsel of June 16, 1977, that:

> "When Mr. Sobony came to my office to execute this application . . . it was not clear . . . whether there would be an assignment of the application to Osobo ...." (Paragraph 2)
>
> * * * *
>
> ". . . as matters now stand, the subject application has been assigned to Osobo ..." (Paragraph 4). (See Appellate Journal Entry, Page 7).

Tilberry, who represented the corporation solely, and who owned shares of Osobo

Games & Toys, Inc. at the time of this transaction, neither advised Sobony to have the Assignment reviewed by independent counsel nor did he explain that Sobony could have entered into a license rather than an assignment and retained ownership and control to protect himself in the event of failure or breach by the corporation. Further, he made no attempt to clear up the known confusion that Sobony had relative to ownership. It is clear that the only consideration which Sobony received for executing the Assignment was the assurance of the corporation's attorney that he would be paid a fair, standard royalty. There is little question that no competent, conscientious attorney representing a client would allow the client to sign the assignment without a collateral agreement with the corporation

specifying royalties. Also, and obviously, the prudent choice would have been a licensing agreement in view of the lack of any track record on the part of this corporation. Tilberry did not tell Sobony that the Assignment was not necessary to the filing of the patent application and Sobony believed that the patent application could not be filed without the Assignment.

Following June 13, 1977, and due to the fact of the Assignment, Sobony was never able to enter into a meaningful royalty arrangement with the corporation. Although the company established a standard policy of royalty payment by virtue of an arrangement with another game, Beverly Hills, at 10% of the wholesale, any negotiations between Sobony and the corporation for royalties ranged between $ .05 and $ .15

per game and always carried conditions such as Sobony selling his stock and waiving any claims against the corporation which would include compensation he never received as an employee of the corporation and a loan he made to the corporation. (He never received the back pay or the loan repayment). These offers were made in utmost bad faith by the corporation, its agents and officers, while Sobony was under duress and under extreme disadvantage because of the subject assignment. The wholesale price of the game was $7.50 and a standard and fair royalty, based on what the company was paying others, would have been $ .75 per game on the game itself. Additionally, the advertising dollars generated for the corporation proximately equalled the money generated from the sale of the games. Accordingly, $1.50

per game would not have been an unfair royalty. The evidence also discloses that Sobony was forced to resign as an officer of the company and to resign from the Board of Directors.

Defendant Tilberry denied interferring with, or even discussing, Sobony's right to receive royalties. He further stated on numerous occasions from 1983 up until and through the trial, that he had no idea whether or not the corporation owed him any money at any given time because he never was privy to those records. He denied having ever seen the records. The uncontradicted testimony and evidence in this case is that Defendant always knew what was owed. Attorney Edward Kent Daniels, a partner in the same firm with Tilberry during the relevant times herein, testified at trial that

Tilberry had received cartons with all the records in question by delivery from the firm to Tilberry's home with receipt for delivery being furnished to the firm. Mr. Daniels also testified that monthly statements of all accounts of clients handled by Tilberry, showing delinquent balances, were placed on Tilberry's desk each month and that Tilberry would certainly be aware of the indebtedness. Further, it was brought out at trial by Mr. Daniels, and admitted by Defendant Tilberry, that Tilberry was charged back by the firm over $20,000.00 which the firm had to write off as bad debt owed by the corporation. Mr. Daniels left the witness stand without cross-examination by the Defendant.

At the trial, Tilberry's witness, former corporate counsel John Urban, after being caught in a lie on the wit-

ness stand, confessed that Tilberry had been pressing for money and threatening to stop his representation of the corporation if he was not paid.

Attorney John Berena, a respected attorney in the community who had served with the Cuyahoga County Prosecutor's Office and with the Justice Department as Chief of the Criminal Division for the district prior to going into private practice, testified at trial that after the Plaintiff had engaged his services, he was advised by Urban that Tilberry was stopping the payment of royalties to Sobony -- that Tilberry was the impediment to negotiations. This was on or about October 18, 1978. Berena further testified that after months of attempting to negotiate royalties with Urban, he received a letter asking him for his

legal theory of entitlement of royalties for Plaintiff. This was after Urban was supposed to have met with Tilberry. On November 20, 1978, Berena met with Tilberry. Berena testified that Tilberry made it crystal clear that he was representing Wesley Reese and Osobo Games & Toys, Inc. Tilberry told Berena that he was familiar with the royalty negotiations and had been in contact regularly with Urban regarding same. Tilberry told Berena that Sobony was not entitled to any royalties. At that point in time, the evidence shows that the corporation was indebted to Tilberry in the approximate amount of $16,000.00.

Subsequently, Mr. Berena attended a shareholder's meeting on March 10, 1979 to negotiate royalties for the Plaintiff. At trial, Mr. Berena reviewed notes

which he had made at the meeting of March 10, 1979, to reflect different offers that were made by the corporation relative to royalties. The last offer was one which proposed that Tilberry receive $ .20 on each game sold until such time that his patent fees were paid in full. Then, once Tilberry was paid in full, Plaintiff would finally start getting $ .15 on each game for the remainder of the patent life. However, this offer was also conditioned upon Sobony selling his stock. Berena testified that he was told by Urban at that time that Tilberry was owed substantial attorney fees and that the Plaintiff could not get royalties until those fees were paid.

Tilberry denied that he ever knew about negotiations for royalties or discussed a claim for royalties with

corporate counsel. Urban testified that he did not remember whether or not he had ever discussed the subject of royalties with Tilberry. Contrary to the foregoing contentions, a letter was exhibited which Urban had written to Tilberry several months before Tilberry met with Berena. In the letter, Urban solicits Tilberry's expert opinion as to whether Sobony has any royalty rights. In response to Urban's letter, a letter was exhibited that Tilberry wrote to Urban on August 30, 1978, which indicated that Tilberry's opinion was unchanged from his opinion the first time inquiry was made as to Sobony's rights, and that opinion was that Sobony had made a complete transfer of his entire right, title and interest to the corporation and that the corporation had complete and full title

to all the rights of the game. It is obvious that since this letter was being written in direct response to Urban's inquiry as to whether Sobony was entitled to royalties, the import of Tilberry's letter is that he was not. The letter further suggests that Tilberry get together with general counsel to discuss the Sobony matter further.

On direct examination of Urban as to any offers of royalty made on March 10, 1979, at the shareholder's meeting, Urban only discussed one offer, stating he was testifying from notes he had with him of that meeting being used to refresh his memory. His testimony confirmed exactly the same proposals that Berena had testified to except that he did not mention the offer which included the $ .20 per unit to Tilberry. In fact, he specifically denied any

such offer regarding Tilberry. Fortunately, on cross-examination, Plaintiff's counsel got hold of Urban's notes and found that it contained a note as part of the royalty negotiations that included the $ .20 for Tilberry, just as Berena had testified.

Defendant Wesley Reese, Tilberry's only other witness, confirmed that approximately 250,000 games of Tryopoly were sold. Sobony never received one penny in royalties or other compensation relative to those sales. Reese acknowledged on the witness stand that, subsequent to the foregoing events, he illegally, and without notification to the other shareholders, transferred all of the assets of the corporation to himself personally.

None of Plaintiff's witnesses were impeached or discredited during the

trial and a wealth of documentary evidence was exhibited to support Plaintiff's case. On the other hand, Tilberry and his two (2) witnesses were all discredited and impeached during the course of the trial. The jury, having sat for some two and one-half weeks, considered the evidence and returned a unanimous verdict in favor of Sobony against Tilberry.

The facts presented in the decision of the Appellate Court, pages one through nine, represent a grossly distorted and biased presentation of evidence in favor of Defendant-Appellee which is not representative of this case, and which is merely a reiteration of the statement of evidence proferred by or on behalf of Tilberry in his Brief, which evidence was wholly controverted and impeached. The Appellate Court chose to ignore a

large volume of unimpeached and uncontradicted testimony presented in favor of Plaintiff-Appellant, while basing its decision on the denials of Tilberry and his witnesses. Further, the Appellate Court totally failed to discuss crucial issues in this case, such as Tilberry's obvious conflict of interest and the confidential relationship he enjoyed with the Plaintiff.

REASONS FOR GRANTING THE WRIT

This may well be a case of first impression on an issue of great constitutional and public importance.

Although this Court has held that the Federal Constitution does not expressly guarantee, through the Seventh Amendment, the right of trial by jury in state courts, there seems to be no decision which directly deals with a situation where, trial is had in a state court to a jury pursuant to state constitutional guarantees, and a state reviewing court violates the litigant's right to due process under state law, which, in effect, results in the deprivation of his right to a jury trial under state law. The question is then not one of a Seventh Amendment guarantee of jury trial in civil cases

as an element of due process applicable to state courts through the Fourteenth Amendment, as dealt with in the case of Bringe v. Collins, 421 US 983, 95 S.Ct. 1986 (1975), but rather one of the litigant's rights under the Fifth Amendment for due process of law as applicable to state courts through the Fourteenth Amendment.

The law in Ohio regarding directed verdicts is well formulated. When considering a Motion for a Directed Verdict, a trial court must construe the evidence most strongly in favor of the party against whom the Motion is directed. Ohio Civil Rule 50(A)(1). In addition to Ohio Civil Rule 50(A), it is well established that the court must neither consider the weight of the evidence nor the credibility of the witnesses in disposing of a directed

verdict motion. Durham v. Warner Elevator Mfg. Co., 166 Ohio St. 31 (1956). When a motion for directed verdict is entered, it is the legal sufficiency of the evidence to take the case to the jury that is being tested. The trial court may not weigh the evidence or try the credibility of witnesses, but must give to the party opposing the motion the benefit of all reasonable inferences from the evidence. Rinehart v. Toledo Blade Co., 21 O. App. 3d 274, 487 N.E. 2d 920 (1985).

In the instant case, the Appellate Court held that the Trial Court erred in failing to direct a verdict in favor of Tilberry on the fraud count. The Appellate Court attempts to weigh the evidence and try the credibility of the witnesses -- a matter exclusively within the province of the jury. In any event,

at page three of the Journal Entry, the Court states that:

> Testimony regarding the signing of the patent application, power of attorney and assignment was conflicting.

The necessary elements of fraud were clearly established by the evidence and it was within the province of the trier of fact, the jury, to determine the weight of the evidence, the credibility of the witnesses, and whether the Plaintiff met his burden of proving fraud by a preponderance of evidence.

The Appellate Court also held that the Trial Court erred in failing to direct a verdict in favor of Tilberry on the conspiracy count. Again, the Appellate Court's own findings demonstrate the conflicting testimony and other evidence which necessitate a determination by the trier of fact, the jury. The Court states, at page twelve,

that:

> A careful review of the record reveals a dearth of probative evidence regarding the conspiracy, and much evidence to the contrary. Sobony's negotiator, his personal attorney, John Berena, testified that Tilberry advised the corporation that royalties were not owed. Tilberry and his witnesses, attorney John Urban and co-defendant Reese, denied this. Even if Tilberry did hold this opinion, nevertheless, both Urban and Reese ignored it and negotiated at length with Sobony over a royalty agreement. (Emphasis added).

The mere statement that there was a denial leads one to the inescapable conclusion that there was conflicting evidence which is arguably susceptible to two interpretations by reasonable minds and, accordingly, should be submitted to the trier of fact for determination. Whether Urban and Reese actually ignored Tilberry's opinion is a question of fact to be determined by the trier of fact -- the jury -- in light of the totality of all circumstances surrounding such negotiations. This issue goes to

the heart of the allegation of conspiracy, and for the court to ignore the testimony of any witness, particularly a respected officer of the court such as John Berena, and to give absolute and unquestionable credence to a witness whose testimony was impeached on the witness stand, is not only improper, but once again invades the sacred province of the trier of fact, and effectively violates and denies Petitioner's right to due process of law. Moreover, it shows that the Appellate Court has construed the evidence most favorably to the parties making the Motion for Directed Verdict, rather than the party opposing the Motion.

It is obvious that the Court's reversal is strictly based on the manifest weight of the evidence, no matter how else it may be termed. The Appellate Court has attempted to substitute itself

for the jury and to re-weigh the evidence as if Plaintiff-Appellant had no right to a jury trial, and as if the jury had not sat patiently for several weeks listening to the testimony, viewing the exhibits and weighing the evidence. The decision of the Appellate Court, reversing the lower court decision assualts the very fabric of the American Judicial System.

In a unanimous decision, the Ohio Supreme Court held that, unlike Ohio Appellate Rule 12(C), where the Court is the trier of the facts, Ohio Appellate Rule 12(D) makes no provision for the Court of Appeals to weigh the evidence when the jury is the trier of the facts. Accordingly, the Appellate Court's outright reversal of the jury verdict is improper. That Court held that to allow the Court of Appeals to enter a final

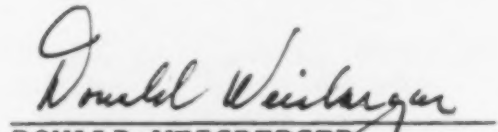
judgment on the weight of the evidence reversing a verdict reached by a jury would be "the denial of the fundamental right to a jury trial. (Emphasis added). Hanna v. Wagner, 39 Ohio St. 2d 64, 313 N.E. 2d 842 (1974).

The decision of the Appellate Court in this case, however otherwise disguised, is an exercise in usurping the function of the jury and substituting its own judgment, for whatever reasons, in weighing the evidence in this case. If a reviewing court is permitted to undermine the most fundamental constitutional guarantee by denying a litigant due process and making a jury trial an exercise in futility, a regretable message will be sent to other reviewing courts which would surely endanger the inviolate right of a person to have a trial by a jury of one's peers.

CONCLUSION

For the foregoing reasons, it is respectfully urged that this Honorable Court grant Petitioner's Writ of Certiorari.

Respectfully submitted,



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28 USCS § 1254.

Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Rule 50(A)(1), Ohio Rules of Civil Procedure.

> "When a motion for directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

Rule 12, Ohio Rules of Appellate Procedure.

(A) Determination. In every appeal from a trial court of record to a court of appeals, not dismissed, the court of appeals shall review and affirm, modify, or reverse the judgment or final order of the trial court from which the appeal is taken. The appeal shall be determined on its merits on the assignments of error set forth in the briefs required by Rule 16, on the record on appeal as provided by Rule 9, and, unless waived, on the oral arguments of the parties, or their counsel, as provided by Rule 21. Errors not specifically pointed out in the record and separately argued by brief may be disregarded. All errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision as to each such error.

(B) Judgment as a Matter of Law. When the court of appeals determines that the trial court committed no error prejudicial to the appellant in any of the particulars assigned and argued in appellant's brief and that the appellee is entitled to have the judgment or final order of the trial court affirmed as a matter of law, the court of appeals shall enter judgment accordingly. When the court of appeals determines that the trial court committed error prejudicial to the appellant and that the appellant is entitled to have judgment or final order rendered in his favor as a matter of law, the court of appeals shall reverse the judgment or

final order that the trial court should have rendered, or remand the cause to the court with instructions to render such judgment or final order. In all other cases where the court of appeals determines that the judgment or final order of the trial court should be modified as a matter of law it shall enter its judgment accordingly.

(C) Judgment in Civil Action or Proceeding When Sole Prejudicial Error Is That Judgment of Trial Court Is Against the Manifest Weight of the Evidence. In any civil action or proceeding which was tried to the trial court without the intervention of a jury, and when upon appeal a majority of the judges hearing the appeal find that the judgment or final order rendered by the trial court is against the manifest weight of the evidence and do not find any other prejudicial error of the trial court in any of the particulars assigned and argued in the appellant's brief, and do not find that the appellee is entitled to judgment or final order as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and either weigh the evidence in the record and render the judgment or final order that the trial court should have rendered on that evidence or remand the case to the trial court for further proceedings; provided further that a judgment shall be reversed only once on the manifest weight of the evidence.

(D) All Other Cases. In all other cases where the court of appeals finds

prejudicial to the appellant, the judgment or final order of the trial court shall be reversed and the cause shall be remanded to the trial court for further proceedings.

IN THE SUPREME COURT OF OHIO

COLUMBUS

1987 TERM

To wit: October 28, 1987

EMERY A. SOBONY, et al.,	:	Case No. 87-1048
Appellants,	:	
v.	:	
OSOBO GAMES & TOYS et al.,	:	E N T R Y
Appellees.	:	

Upon consideration of the motion for an order directing the Court of Appeals for Cuyahoga County to certify its record, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overfuled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by Robert S. Passov.

s/ THOMAS J. MOYER
THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify

that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 28th day of October, 1987.

s/ MARCIA J. MENGEL CLERK

s/ RITA A. JACKSON DEPUTY

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 51720

EMERY A. SOBONY, ET AL.	:	
Plaintiff-Appellees	:	
vs.	:	
	:	JOURNAL ENTRY
OSOBO GAMES & TOYS, INC., ET AL.	:	and OPINION
Defendant-Appellants	:	

DATE OF ANNOUNCEMENT OF DECISION:

CHARACTER OF PROCEEDING: Civil appeal from Common Pleas Court, No. 006,482.

JUDGMENT: Reversed.

DATE OF JOURNALIZATION:

APPEARANCES:

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For
Defendant-Appellants: Mark O'Neill, Esq.
2500 Terminal Tower
Cleveland, OH 44113

DAVID T. MATIA, J.:

Defendant-appellant James H. Tilberry timely appeals from a $225,000 jury verdict rendered against him in favor of Plaintiff-appellant Emery A. Sobony.

This action was filed in the Common Pleas Court of Cuyahoga County in December 1979. The plaintiffs were Emery A. Sobony and Rachel Powell. The defendants were James H. Tilberry, a patent attorney, Osobo Games & Toys, Inc., Wesley Reese, and James Davenport. At the trial held in January-February 1986, appellant Tilberry's motion for a bifurcated trial was granted and the jury only heard evidence relative to appellee-Sobony's (hereinafter referred to as Sobony) claim against appellant Tilberry (hereinafter referred to as Tilberry).

In March of 1978, Sobony and co-defendant Wesley Reese engaged the law firm of Cassidy and Mottl (not a party) to organize a corporation (Osobo Games & Toys, Inc., party defendant) to manufacture and market a board game called "Tryopoly," which Sobony invented. "Tryopoly" was similar to the board game "Monopoly," but with local businesses, which generated advertising dollars, as the counterpart to "Monopoly" 'properties'. The corporation, Osobo Games & Toys, Inc. was headed by the Sobony as president, and by co-defendant Wesley Reese as chairman of the board. Sobony and co-defendant Reese were the principal shareholders. The two men and their wives were elected to the seven member board of directors. Initially they issued 150 shares of stock and Sobony and co-defendant Reese received 50 shares

each. Later, both Sobony and co-defendant Reese each received 25 'free' shares for services performed during the formation of the company.

The corporation's law firm of Cassidy & Mottl referred Sobony and co-defendant Reese to Tilberry, a patent lawyer, to prepare a patent application for the game. Tilberry met with Sobony in April 1977 and worked closely with Sobony in April, May and June to perform the necessary patent work for the new corporation. Tilberry's legal services were always billed to the corporation and he was not personal counsel to either Sobony or co-defendant Reese.

On June 13, 1977, Sobony read and signed a patent application, power of attorney and assignment of rights to the game over to the corporation. Testimony regarding the signing of the

patent application, power of attorney and assignment was conflicting. Tilberry testified that he understood from the first meeting with Sobony that the company was to own the rights to the game. On June 13, 1977, Tilberry explained the assignment fully, and Sobony read it and then signed it. The assignment states in pertinent part:

"ASSIGNMENT"

"WHEREAS, ASSIGNOR: EMERY A. SOBONY of the City, County and State of: Cleveland, Cuyahoga, Ohio has made an invention in PROMOTIONAL AND ADVERTISING BOARD GAME and has executed on June 13, 1977, an application for Letters Patent of the United States on said invention, hereinafter referred to as 'said application';

"AND, WHEREAS, OSOBO GAMES & TOYS, INC., a corporation of the State of Ohio having its principal place of business at 12668 Janette Dr., Strongsville, Ohio 44136 hereinafter called ASSIGNEE, is desirous of acquiring the entire world-wide rights, title and interest in, to and under said invention and said application;

"For good and valuable consider-

ation, the receipt and sufficiency of which is acknowledged, ASSIGNOR hereby sells, transfers and assigns to the ASSIGNEE, its successors, assigns, nominees, or other legal representatives the full, exclusive, entire, world-wide rights, title and interest in, to and under said invention as described and claimed in said application, the same to be held and enjoyed by ASSIGNEE for its own use and enjoyment, and for the use and enjoyment of its successors, assigns, nominees, or other legal representatives, to the end of the term or terms for which said Letters Patent are or may be granted, reissued or extended, as fully and entirely as the same would have been held and enjoyed by ASSIGNOR if this assignment and sale had not been made; ...."

According to Tilberry, Sobony asked many questions after signing all the papers, including the assignment. Tilberry contends he discussed royalties with Sobony in general terms. He denied telling Sobony that the corporation would pay royalties to Sobony. Tilberry stated at trial:

"... at no time during the discussion did he ever indicate to me that the assignment was not to be filed as he had executed it. So I consider this to

be a matter -- an internal matter between the president and his own company to work out." (Tr. 321).

On the other hand, Sobony testified that "... it was always assumed that Osobo (the corporation) would have the rights to the game. It was Osobo, the company, me and Wes." (Tr. 386). Appellee Sobony stated that he read the assignment and didn't understand the entire agreement. Sobony testified:

"I asked what was the valuable consideration. He said it would be any compensation that was set up by the company as a standard policy. I said, well, it says that I have to understand it. He says that it would be a policy that we would set in the standard game and toy industry. ***He said that it would be that we would discuss it or come up with a compensation later.

***

"Q. Mr. Sobony, did you discuss what form the valuable consideration would take?

"A. Yes. Again, it wouldn't -- it was like royalties. I had no definition of royalties. I didn't expect Mr. Tilberry to say, well, you are going to get two cents a game. It

was hard to put a figure on it because he wasn't sure of the toy and game industry. Different royalties are different percentages in different fields.

It was whatever the standard was, as far as compensation in the toy and game industry. I was satisfied with his answer." (Tr. 419-420).

***

"Q. Sir, other than royalties being paid, was there any other discussion about what form compensation might take?

"A. Not that I recall. It was compensation in the form of royalties, but we couldn't set what it was. It's hard to distinguish royalties per game in the advertising. It's hard to know if you are going to get paid on something that has never been established before." (Tr. 421).

***

"Q. That day when you signed that, when you left Mr. Tilberry's office, what did you think you had signed?

"A. Well, my rights to the game. I remember from then on it says -- it said so and then like on the third or fourth line on it encompassed a whole world. I mean it was territories forever. I know that I had given up my rights for the

> game, but that was agreed upon before, so I didn't -- I wasn't uncomfortable with that part as much as -- [***] I understood I was assigning my rights to Osobo Games & Toys so they could market and sell the game anywhere in the world and for any length of time for good and valuable consideration. That's my side." (Tr. 422-423).
>
> ***
>
> "My understanding was that Osobo Games & Toys would have the right to sell and manufacture the game and that I would always own the patent. It would be my patent." (Tr. 510).

Tilberry testified that in the general context of the discussion, he later realized that Sobony was completely confused on the subject of royalties and ownership on June 13, 1977. He wrote a letter to Sobony's general counsel, dated June 16, 1977 which stated, in pertinent part:

"Enclosed herewith for your file is a copy of the subject application which was forwarded to the United States Patent Office for filing Monday, June 13, 1977.

"When Mr. Sobony came to my office to execute this application, it became clear that no one at Osobo has given any thought to the consequences of ownership of patents. Thus, it was not clear as between Messrs. Reese and Sobony whether this application was to be owned by Mr. Sobony or by Osobo; whether there would be an assignment of the application to Osobo or whether Osobo would be even licensed under the application.

"Accordingly, it is quite important that Osobo not be permitted to drift too long and that a policy be formulated with respect to ownership of ideas developed by employees and associates of Osobo. Thus, for instance it would be our recommendation that Osobo require that every employee of the company enter into an employment agreement wherein the respective rights of Osobo and employees to employees (sic) inventions are clearly defined.

"As matters now stand, the subject application has been assigned to Osobo, but there has been no determination whether the assignment is royalty free or whether Mr. Sobony will receive a royalty on each game sold in exchange for the assignment.

"Consideration for assignments of inventions to employers vary from company to company, and also vary in accordance with the nature of the work being done by the employee. Where an employee is hired expressly for the purpose of developing new products and inventing them his

salary is usually considered full consideration for his obligation to assign his rights to anything developed during his employment. However, this is not universal and any arrangement may be worked which is agreeable between the employee and the employer. Thus, it is not inconceivable that Osobo may decide that it is in its best interest to pay a royalty of some amount to creators of new products which are patentable and/or profitable to Osobo. In any event, if not attended to promptly and properly, a very thorny problem could develop within the Osobo organization."

During the summer and fall of 1977, the game was further developed and produced in time to sell 9,000 games over the Christmas season.

In February 1978, a new application was filed covering the modifications in the game. Mr. E. Kent Daniesl, Jr., an associate of Tilberry mailed the patent application, power of attorney, and assignment to Sobony, who executed all the papers without question.

In May 1978, Sobony approached co-defendant Reese and general counsel

John Urban (of the law firm of Cassidy & Mottl) about the issue of royalties. Negotiations over royalties spanned the year of 1978 and into the spring of 1979.

Sobony hired a personal attorney, John Berena, to continue negotiations on Sobony's behalf. Negotiation offers made by the corporation ranged from five cents per game to fifteen cents per game and an offer to buy-back appellee Sobony's stock. Appellee was dissatisfied with those offers made by the defendant corporation. Sobony then asked for seventy-five cents a board game plus seventy-five cents for advertising for each game.

Due to the animosity that developed, Sobony resigned as president in June 1978. He went to work for a competitor in August 1978, although he remained a director until he was voted off the board

in March 1979. Since he never reached a royalty agreement with the company, Sobony filed his complaint against co-defendant appellant Tilberry, the co-defendant company, and the co-defendants Wes Reese and James Davenport in December 1979. The company became defunct in 1980.

Sobony's complaint stated that Tilberry fraudulently induced him to assign his ownership in the game to the corporation. He alleged that Tilberry conspired to deprive him of his right to royalties from the game. At the trial held in January-February 1986, appellant Tilberry's motion for a bifurcated trial was granted and the jury only heard evidence relative to appellee-Sobony's claim against appellant Tilberry. During the jury trial, Tilberry moved for a directed verdict after the close of Sobony's evidence and

after all the evidence had been produced. The trial court denied both motions. Sobony's request that the court instruct the jury on punitive damages was denied. The jury awarded $225,000 in compensatory damages to Sobony.

Tilberry timely appeals the judgment and asserts eight assignments of error. Sobony cross-appeals the trial court's denial of punitive damages. We will address Tilberry's assignments of error first.

Tilberry's assignments of error numbered 1, 2 and 8:

Assignment of Error No. 1:

"THE LOWER COURT ERRED IN FAILING TO DIRECT A VERDICT ON THE FRAUDULENT INDUCEMENT COUNT."

Assignment of Error No. 2:

"THE LOWER COURT ERRED IN NOT DIRECTING A VERDICT ON THE CONSPIRACY COUNT."

Assignment of Error No. 8:

"THE VERDICT IS UNSUPPORTED BY COMPETENT EVIDENCE, IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE, AND IS CONTRARY TO LAW."

Through these three assignments of error, Tilberry challenges the trial court's judgment as being contrary to law and against the manifest weight of the evidence. Consequently, the three assignments of error shall be addressed together.

Tilberry argues that the trial court erred in overruling his motions for directed verdict pursuant to Civ. R. 50(A). We agree.

At trial, when a motion for directed verdict has been made, the trial court shall construe the evidence most strongly in favor of the party against whom the motion is directed. If the court finds that upon any determinative issue reasonable minds could come to but one

conclusion, and the conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue. Civ. R. 50(A)(4).

Tilberry's motions attached the insufficiency of Sobony's evidence on the allegations of fraud and conspiracy. Such evidence in fact was insufficient and the motions should have been granted by the trial court.

This court discussed the elements of an action for fraud in Friedland v. Limpman (1980), 68 Ohio App. 2d 255 wherein the court quoted Klott v. Associates Real Estate (1974), 41 Ohio App. 2d 118, 120-121, as follows:

> "***actual or implied representations or concealment of a matter of fact which relates to the present or past, and which is material to the transaction; made falsely, with knowledge of its falsity, or

> with such disregard and recklessness as to whether it is true or false that knowledge may be inferred; with the intent of misleading another into relying upon it; and reliance upon it by the other person with a right to so rely; with resulting injury as the consequence of such reliance."

Sobony had the burden of proving by the preponderance of the evidence that Rilberry's statement that the co-defendant corporation would pay royalties misled him into assigning his ownership rights to his own corporation. In fact, the record does not affirmatively support Sobony's allegations of fraud and conspiracy. The necessary elements of fraud were not established by Sobony's insufficient evidence.

An essential element of fraud is a false representation relating to a past or existing event. Friedland, supra; Glass v. O'Toole (1930), 36 Ohio

App. 450, 452. In the instant case, even after accepting Sobony's testimony as true pursuant to Civ. R. 50(A), Tilberry's statement does not constitute fraud since it relates to a future contingency beyond the control of the alleged speaker. Mere predictions about the future, expectations, or opinions are not fraudulent misrepresentations unless those opinions are fraudulently made. Davish v. Arn (Montgomery Co. Ct. App. 1940), 32 Ohio Law Abs. 646, 655. In the case sub judice, Tilberry's statement amounted to a mere prediction of future events which were in the control of Sobony and his company.

Based on the foregoing, we conclude that there was insufficient evidence to maintain an action for fraud.

Tilberry's second contention, that the trial court erred in not directing

a verdict in his favor as to the conspiracy count, also has merit.

Conspiracy is defined as a combination of two or more persons engaged in a knowing concert of action for a criminal purpose by criminal or unlawful means. Herr-Morr, Inc. v. Herring Enterprises, Inc. (Mar. 13, 1986), Cuyahoga App . No. 50325, unreported. In Hoffman v. Johnston (1941), 68 Ohio App. 20, 29, the Court stated:

> "No civil action lies against any one for conspiracy unless something is actually done by one or more of the conspirators pursuant to the scheme and in furtherance of the object which act results in damage."

Thus, to support the trial court's finding the record in the instant case must demonstrate that Tilberry and some other co-conspirator maliciously schemed to damage Sobony. Minarik v. Nagy (1963), 8 Ohio App. 2d 194, 196.

A careful review of the record reveals a dearth of probative evidence regarding the conspiracy, and much evidence to the contrary. Sobony's negotiator, his personal attorney, John Berena, testified that Tilberry advised the corporation that royalties were not owed. Tilberry and his witnesses, attorney John Urban and co-defendant Reese, denied this. Even if Tilberry did hold this opinion, nevertheless, both Urban and Reese ignored it and negotiated at length with Sobony over a Royalty agreement.

Thus, the evidence presented by Sobony did not support the jury's conspiracy verdict. We therefore rule that the finding that Tilberry conspired with the company's general counsel and the company against Sobony is against the manifest weight of the evidence.

Tilberry's first, second, and eighth assignments of error are well taken.

Assignment of Error No. 3:

"THE TRIAL COURT ERRED IN ALLOWING THE ISSUE OF DAMAGES TO BE CONSIDERED BY THE JURY, WHEN THERE WAS NO EVIDENCE THAT TILBERRY HAD CAUSED THE PLAINTIFF TO SUSTAIN ANY DAMAGE."

In this assignment of error Tilberry contends that the trial court erred in submitting the issue of damages to the jury, which based its award upon speculation. We agree.

Compensatory damages may not be based upon mere speculation. Swartz v. Steele (1974), 42 Ohio App. 2d 1. Here, Sobony had the burden of proving by a preponderance of the evidence the nature and extent of damages. Reeg v. Hodgson (1964) 1 Ohio App. 2d 272. Based on our arguments above, Sobony did not produce sufficient evidence as to the charges and, therefore, did not provide sufficient

Tilberry's counsel objected to co-defendant Reese's reading the letter to the jury, and the trial court overruled the objection. In the letter, co-defendant Reese's counsel stated "that there have been approximately a quarter of a million (250,000) games that were sold, both as out and out sales or as promotional purposes." Later, Sobony's counsel offered Exhibit 31 into evidence, and this time Tilberry's objection was in fact sustained. Tilberry now argues that the reading of the letter was impermissible hearsay which prejudiced the appellant. We disagree.

The letter written by Reese's counsel is within the purview of Evid. R. 801(D)(2) admission by party-opponent. Here, the letter was a statement by a person authorized by co-defendant Reese to make a statement concerning the subject, and

was a statement by his agent concerning a matter within the scope of his agency or employment made during the existence of their relationship. Thus, the trial court properly permitted co-defendant Reese to read the letter written by his personal counsel.

Accordingly, Tilberry's fourth assignment of error is overruled.

Assignment of Error No. 5:

"THE VERDICT AND JUDGMENT ARE THE PRODUCTS OF MISCONDUCT ON THE PART OF COUNSEL FOR THE PREVAILING PARTY."

Assignment of Error No. 6:

"THE VERDICT REFLECTS PASSION AND PREJUDICE ON THE PART OF [THE] JURY WHICH WAS INDUCED BY THE FRANK APPEALS TO PUNITIVE BIAS WHICH WERE MADE BY COUNSEL FOR THE PREVAILING PARTY."

Tilberry argues that Sobony's counsel overstepped his bounds by making misleading, sarcastic, prejudicial statements throughout the course of the trial.

A review of the entire record reveals that much of the commentary objected to by Tilberry was sustained by the trial court.

We find, further, that there was no timely objection to much of the material to which Tilberry now complains. It is a basic proposition of law that an appellate court will not consider a claim of error where the alleged error was not brought to the attention of the trial court by a timely objection. Stores Realty Co. v. Cleveland (1975), 41 Ohio St. 2d 41.

A judgment will not be reversed on the ground of misconduct in closing argument unless the circumstances are of such reprehensible and heinous nature as to constitute prejudice. 53 Ohio Jurisprudence 2d 168-169, Trial, Section 258. Tilberry argues that reversible

error occurred during the trial when the trial judge left the bench during closing argument. Tilberry contends Sobony's counsel abused his privilege by relating a private conversation with co-defendant Reese regarding the number of games sold. Tilberry's counsel objected to the unsworn narrative by counsel and the trial judge was summoned. The trial judge sustained the objection and admonished the jury to "remember what was said and what was done." (Tr. 1342).

Tilberry;s argument that Sobony's counsel committed error has merit. State, ex rel. Brown, v. Howard (1981), 3 Ohio App. 3d 189, 190. It is fact, however, that the trial court rendered the comments harmless by its admonition to the jury. As such, the comments do not demonstrate a need to reverse the trial court's judgment on this basis.

Accordingly, Tilberry's fifth and sixth assignments of error are overruled.

Assignment of Error No. 7:

"THE TRIAL COURT'S INSTRUCTIONS TO THE JURY INTRODUCED IMMATERIAL AND CONFUSING ELEMENTS WHICH OPERATED TO THE PREJUDICE OF TILBERRY."

Tilberry contends that the trial court erred in instructing the jury as to the elements of a contract. Tilberry's objection was that the instruction introduced a confusing issue which may have operated to the detriment of Tilberry. We disagree. The trial Court's instruction as to the elements of a contract were not improper.

Accordingly, Tilberry's seventh assignment of error is overruled.

The following is statement of issues presented by plaintiff-appellee Sobony:

"WHETHER THE TRIAL COURT ERRED IN NOT ALLOWING THE ISSUE OF PUNITIVE DAMAGES TO BE SUBMITTED TO THE JURY FOR CONSIDERATION."

Sobony's argument is not well taken. The Supreme Court of Ohio, in Detling v. Chockley (1982), 70 Ohio St. 2d 134, held that actual malice is required for a question of punitive damages to be submitted to the jury.

Here, Sobony failed to show aggravated, willful, wanton or malicious conduct by Tilberry. Therefore, the trial court was correct in refusing to charge the jury on the issue of punitive damages.

Accordingly, the judgment is reversed. The trial court is instructed to render judgment in favor of Tilberry.

This cause is reversed consistent with the opinion herein. It is, therefore, considered that said appellants recover of said appellees their costs herein.

It is ordered that a special mandate

be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Exceptions.

s/ NAHRA, P.J. and

s/ ANN MCMANAMON, J., CONCUR.

s/ DAVID T. MATIA, J.

JUDGE
DAVID T. MATIA

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

IN THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, OHIO

CASE NO. 79-06482-T Matia

JUDGE LEO SPELLACY

EMERY A. SOBONY, et al.,	)	
Plaintiffs,	)	
vs.	)	
OSOBO GAMES & TOYS, INC., et al.,	)	JOURNAL ENTRY
Defendants.	)	

The Court having previously ordered that the claims of plaintiff Emery A. Sobony against defendant James H. Tilberry be tried separately from the claims of various plaintiffs against various other defendants, and trial having resulted in a verdict against James H. Tilberry on February 10, 1986 in the amount of Two Hundred Twenty Five Thousand Dollars ($225,000.00), and the Court having reserved for later

consideration the claims of plaintiffs Emery A. Sobony and Rachel Powell against defendants Osobo Games & Toys, Inc., Wesley Reese, and James Davenport, the Court now expressly determines pursuant to O.R.C.P. 54(B) that there is no just reason for delaying an appeal from the judgment of February 19, 1986, which was entered on the verdict, and it hereby certifies that said judgment is final. Assigned judge unavailable.

s/ LEO SPELLACY
LEO SPELLACY

RECEIVED FOR FILING March 6, 1986.